



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
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San Francisco, CA 94105

SFUND RECORDS CTR  
2059912

August 11, 2004

Albert M. Cohen  
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Suite 2200  
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Re: Revised Omega *De Minimis* Settlement Offer  
Omega Chemical Superfund Site  
Whittier, California

Dear Mr. Cohen:

Thank you for your letters regarding the Omega *De Minimis* Group's ("the Group") comments and concerns related to the *de minimis* settlement offer for the Omega Chemical Superfund Site ("the Site") in Whittier, California. In your letter dated May 7, 2004, you asked the Environmental Protection Agency ("EPA" or "the Agency") to do three things: one, reevaluate the cost estimate; two, broaden the scope of the settlement to include additional releases from claims arising in the future which were not part of the February 2004 settlement offer; and three, reduce the 100% premium or allow private insurance in lieu of a 100% premium

This letter will discuss the manner in which EPA has considered the Group's concerns and discuss the changes which EPA is making to the *de minimis* settlement offer. EPA has met with the Group, its consultant and AIG Insurance, Inc., to talk about your concerns. Further, the Agency has in good faith attempted to incorporate requested changes which are consistent with Agency policy, guidance and similar Superfund sites.

1. EPA's Cost Estimate<sup>1</sup>

Future Response Costs

On May 19, 2004, the Group's consultant, LFR Levine • Fricke ("LFR"), provided comments to EPA's report "Conceptual Cost Estimate for Sitewide Remedial Action, Omega Chemical Superfund Site." This report estimated all future costs which would be incurred to address Site contamination up to 30 years in the future. It relied upon all known data regarding the extent and

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<sup>1</sup> The basis of the cost estimate is documented in reports and memoranda created prior to the February 2004 settlement offer. Because of the need to extend settlement offers prior to February 28, 2004, the statute of limitations deadline for the work PRPs to file a contribution action against *de minimis* parties, this information was not compiled into a user friendly comprehensive document until April 6, 2004, entitled "Conceptual Cost Estimate for Sitewide Remedial Action, Omega Chemical Superfund Site." The final memorandum prepared prior to the settlement offer and the April 6, 2004 memorandum contain the same data and analysis to support the basis of the cost estimate. EPA has provided both documents to the Group.

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character of the contamination at the Site at the time the settlement offer was extended. It is not necessary to determine a precise figure because the Agency is not selecting a remedy. See EPA Guidance: "Methodology for Early *De Minimis* Waste Contributor Settlements under CERCLA Section 122(g)(1)(A)" June 2, 1992. EPA's full response to the comments is enclosed.

LFR contends that the assumed plume volume is too great and that EPA has not accounted for other possible sources. EPA has rejected this argument based upon the fact that the groundwater plume, which extends at least 2.2 miles downgradient from the Omega facility, is continuous and the contamination is commingled. Thus, the contamination is not divisible among potential sources. LFR also contends that EPA's cost estimate includes an "overly complex and expensive treatment system." EPA believes that the assumed treatment system is appropriate at this preliminary stage of the Site investigation. Moreover, based upon data gathered after EPA developed its cost estimate to support the settlement offer, the concentrations of some contaminants are actually increasing within the plume and at least one additional emerging contaminant has been identified. This suggests that treatment costs could actually be greater than EPA assumed.

#### Discount Rates

In the Group's May 7, 2004 letter to EPA, the Group contends that EPA failed to follow its own guidance – "A Guide to Development and Documenting Cost Estimates During the Feasibility Study" dated July 2000 – by using discount rates of 5.2% and 3.10%. This guidance recommends using a 7% discount rate for the purpose of comparing the costs of remedial alternatives during the remedy selection process. However, in this case, EPA is not comparing remedial alternatives and, consequently, that guidance is not applicable here. Rather, the purpose of the cost estimate is to ensure that EPA collects sufficient funds to clean up the Site based on expected earnings on settlement proceeds after inflation.

In determining the appropriate discount rate, EPA followed the Office of Management and Budget's Circular A-94 entitled "Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs." The purpose of this guidance is to promote efficient resource allocation through well-informed decision-making by the federal government. It also provides specific guidance on the discount rates to be used in evaluating federal programs whose benefits and costs are distributed over time (three or more years in the future). This guidance applies to all agencies of the Executive Branch of the federal government including EPA. In the Omega Cost Estimate, EPA used the 10 year average, 1994 through 2003, of the 3-year nominal treasury interest rates as the discount rate: 5.2%. EPA did not use a 3.1% discount rate for this estimate.

## 2. Additional Releases

The Group contends that the settlement should address the risk of future claims not covered in the scope of the agreement. Specifically, the Group requested protection from natural resource damage claims, claims related to offsite contamination, and claims asserted by the State of California including the Regional Water Quality Control Board ("RWQCB") and the Department of Toxic Substances Control ("DTSC").

EPA has contacted the Department of Interior ("DOI") in regard to seeking a release from natural resource damage claims at the Site for the *de minimis* parties. At this time DOI has not asserted any natural resource damage claims at the Site and EPA is optimistic that the *de minimis* settlement will include a covenant not to sue from federal Natural Resource Trustees.

The federal government will not be able to provide settlers protection from liability at offsite locations for contamination caused by wastes shipped from the Omega facility to another location. Under CERCLA Section 122(g)(2), the scope of the covenant not to sue extended to *de minimis* parties is limited to the particular facility of concern in the settlement. Therefore, the Omega *de minimis* settlement will be limited to the Omega Chemical Superfund Site.

EPA has contacted DTSC requesting their participation in the Omega *de minimis* settlement. EPA and DTSC are currently drafting provisions in the settlement document which will include a covenant not to sue from DTSC. EPA has also sent an inquiry to the RWQCB to request their participation. To date the RWQCB has shown no interest in the Site and no interest in becoming a party to the *de minimis* settlement.

### 3. The 100% Premium

The Group contends that the 100% premium amount is unreasonable because the cost estimate is overly conservative and that, in any case, private insurance is available at a much lower cost to cover potential cost increases. EPA disagrees with the Group's contention that the premium amount is unreasonable. EPA applied a premium of 100% to estimated future cleanup costs, which is consistent with national guidance for *de minimis* settlements and with other *de minimis* settlements across the nation. See EPA Guidance: "Standardizing the *De Minimis* Premium" July 7, 1995. This premium is applied to address the level of risk transferred to other parties and EPA for all unknown conditions that may affect Site investigations and cleanup costs in the future.

Notwithstanding the Group's contention that the 100% premium is unreasonable, more than half of the *de minimis* parties (153) have accepted EPA's offer and are prepared to settle on the terms of that agreement which includes a 100% premium. The number of parties willing to settle on the current terms indicates that the terms are not unreasonable to parties in a similar position as the Group's members.

### Private Insurance

In regard to the proposal of using private insurance in lieu of a premium, EPA Region 9 met with the Group and AIG Insurance on June 24, 2004, to discuss how a private insurance policy could work in the *de minimis* party context. The Region then reviewed the Agency's experience with private insurance as a means of financial assurance at other Sites. Finally, the Region consulted with the Department of Justice ("DOJ") and EPA Headquarters. After this review, EPA and DOJ believe that using private insurance in the manner suggested by the Group would not be an effective tool at the Omega Site and could frustrate the cleanup. EPA's concerns about using private insurance in lieu of a premium in the *de minimis* settlement are as follows:

- Obtaining the major contributor work parties' agreement to participate in the manuscripting of an insurance policy and to later seek reimbursement from the insurance company. (The major contributor work parties have not agreed to perform future work addressing the groundwater plume.);
- Converting the statutory obligation of potentially responsible parties to pay cleanup costs to a contractual obligation of an insurance company to pay on its policy;
- Naming the federal government and the major contributor work parties as the insured;
- Shifting the responsibility to resolve insurance disputes with insurers to the federal government and major contributor work parties at the Site;
- Recovering costs from the insurance company is uncertain and will not be ascertainable until claims are filed some time in the future.

Although EPA will not use private insurance in lieu of a premium in the Omega *de minimis* settlement, we do recognize that a 100% premium may be a hardship on smaller businesses. Thus, the agency is revising its settlement offer to provide for a second option with a lower premium and re-openers. Parties electing the second option may choose to seek private insurance independent of EPA involvement.

### **REVISED SETTLEMENT OFFER**

EPA is modifying its February 2004 settlement offer to provide *de minimis* parties a cash-out settlement option with re-openers as an alternative to the 100% premium in the February 2004 settlement offer. In the revised settlement, which will be offered to all *de minimis* parties, settling parties will have the opportunity to choose from either a cash-out settlement option that closely mirrors the terms of the initial settlement offer (Option A) or the cash-out settlement option with re-openers if the cleanup costs exceed the current cost estimate (Option B). EPA intends to extend both options to all *de minimis* parties including those who have agreed to settle. Each of these options is described more fully below.

#### **Option A: Cash-out Settlement with Comprehensive Releases**

Under Option A, a settling party receives a release from the United States for all present and future liability at the Site by paying its share of the estimated costs in EPA's Cost Estimate, based upon the number of tons of waste it sent to the Site, plus a 100% premium to cover future Site-related and enforcement uncertainties. Pending final approval by DOI and the State of California, Option A settling parties will also receive a release from liability for natural resource damages and response costs from the federal Natural Resource Trustees and a release from liability to DTSC for response costs incurred by that agency. The addition of these releases from liability for natural resource damages and DTSC's costs is the only difference between this Option A and the initial EPA settlement offer.

OPTION A		
\$12,632 per ton of waste sent to the Site which includes a 100% premium	No Re-openers Final Cash-out settlement	Possible Releases from Natural Resources Trustees and the State of California DTSC

Option B: Limited Cash-out Settlement with Cost Re-openers

Alternatively, under the newly created Option B, settling parties can pay less money up front but receive more limited liability releases from the United States with respect to the Site. Under Option B, a settling party pays a 50% premium, compared to the 100% premium under Option A. EPA may re-open the settlement and require Option B settling parties to pay additional money in the future for Site costs in excess of the current Cost Estimate. Such additional payment(s) may be required at two points in time in the future. One, if the cost estimate used in the Record of Decision ("ROD") to select the final remedy at the Site is greater than the existing Cost Estimate used for this *de minimis* settlement, EPA may seek additional payment from settling parties who chose Option B. Two, if Site costs at the time of the final remedy is completed, but no later than January 1, 2013, exceed the existing cost estimate used for this *de minimis* settlement, EPA may also seek additional payment.

OPTION B		
\$9,678 per ton of waste sent to the Site which includes a 50% premium	Re-openers	No releases from Natural Resource Trustees and the State of California DTSC

As indicated above, the price per ton of waste under Option B has been reduced by \$2,954 per ton of waste. This translates into a 23% reduction of the *de minimis* party's settlement amount under Option B. For the single largest *de minimis* party, this newly created option would result in a reduction in the payment amount from \$126,320 under Option A to \$96,780 under Option B. For the single smallest *de minimis* party, Option B would result in a reduction from \$37,896 to \$29,034.

As you know, the extended deadline to accept EPA's original settlement offer is August 27, 2004. EPA is now extending this deadline to September 10, 2004, to allow *de minimis* parties an opportunity to consider the revised settlement offer. The Agency will send a revised signature page to all *de minimis* parties giving them the ability to choose either Option A or Option B in the near future. Any party who accepted the original settlement offer (Option A) will have the opportunity to take Option B if it so chooses. For all *de minimis* parties, included those parties who accepted the original settlement offer, the deadline to submit the revised signature page is September 10, 2004. If *de minimis* parties who have already accepted EPA's offer do not submit a revised signature page by September 10, 2004, the Agency will assume that those parties are choosing Option A.

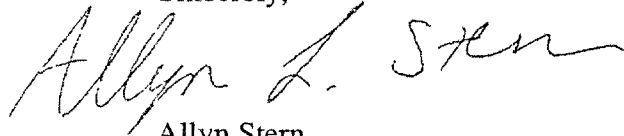
As an incentive for early settlement, a 5% discount was offered to *de minimis* parties that agreed to settle with EPA by May 7, 2004, and approximately 50% of all *de minimis* parties accepted the settlement offer by that date. *De minimis* parties can still agree to settle with EPA and challenge

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waste volumes until September 10, 2004 without penalty, but will not be eligible for the 5% discount.

In closing, we believe that the Agency has responded to the Group's settlement concerns. The revised settlement offer is a fair and reasonable resolution of the *de minimis* parties' liabilities at the Site that balances the concerns of the *de minimis* parties and our desire to ensure that we are able to finance a remedy at the Site which protects human health and the environment. You should be advised that the revised settlement offer represents the best and final offer that the federal government will be making to *de minimis* parties, and that we will not be considering any further changes to the proposed settlement offer. We hope that you will recommend the settlement to your clients and that your clients will accept it.

Sincerely,



Allyn Stern  
Acting Branch Chief  
Office of Regional Counsel Hazardous Waste Branch

Enclosures

cc:	Thanne Cox, EPA	Lewis Maldonado, EPA	Peter McGaw, OSVOG
	Linda Ketellapper, EPA	Elizabeth Adams, EPA	Chuck McKinley, DOI
	Chris Lichens, EPA	Karl Fingerhood, DOJ	Bonnie Wolstoncroft, DTSC
	Frederick Schaffler, EPA	OPOG Steering Committee	Other Major Parties

cc w/out enclosures:

Rep. David Dreier	Rep. William Thomas	Sen. Jon S. Corizine
Rep. Gary G. Miller	Rep. Grace Napolitano	Sen. John McCain
Rep. Christopher Cox	Rep. Lois Capps	Sen. Dianne Feinstein
Rep. Howard Berman	Rep. Linda Sanchez	Sen. Barbara Boxer
Rep. Mike Thompson		